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Case No. 86-1034

In the

Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF VIRGINIA,

Appellant,

vs.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.,

Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF OF CITY OF MINNEAPOLIS, AMICUS CURIAE, SUPPORTING JURISDICTIONAL STATEMENT OF APPELLANT, COMMONWEALTH OF VIRGINIA

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QUESTION PRESENTED

Is the 1985 Amendment to §18.2-391 of the Code of Virginia, making it illegal to knowingly display sexually explicit material that is obscene as to children in a manner that allows children to examine and peruse such obscene material, unconstitutional on its face?

PARTIES BELOW

The appellants in the court of appeals were the Commonwealth of Virginia, by her Attorney General, and William K. Stover, Chief of Police for Arlington County, Virginia. The appellees were the American Booksellers Association, Inc., the Association of American Publishers, the Council for Periodical Distributors Association, Inc., the National Association of College Stores, Inc., Books Unlimited, Inc., of Arlington, Virginia, and Ampersand Books of Alexandria, Virginia.

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OPINIONS BELOW

The City of Minneapolis calls to this Court's attention the decisions reported concerning the Minneapolis Ordinance where those decisions concern the **Constitutional** issues presented identically by the Virginia statute. Those decisions are reported at 602 F.Supp. 1361 and 780 F.2d. 1389.

JURISDICTION

In addition to the jurisdiction explicitly invoked by the Commonwealth of Virginia, Amicus would urge this Court to consider the direct conflict between the decisions of the 10th and 8th Circuits on one hand, and that of the 4th Circuit on the other, presented on Constitutional issues requiring clear and uniform application.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amicus adopts the statement of Appellant.

STATEMENT OF THE CASE

Amicus adopts the statement of Appellant.

THE INTEREST OF THE AMICUS CURIAE

In June 1984, the City Council of the City of Minneapolis responded to the clear invitation of this Court set out in **Miller v. California**, 413 U.S. 15, 18-19, (1973) to

regulate the commercial display of obscene materials:

> This Court has recognized that the States have a legitimate interest in prohibiting dissemination or **exhibition** of obscene material when the **mode** of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of **exposure to juveniles.** (Emphasis supplied and 13 citations omitted).

This Court reiterated this invitation and the basis therefor in **Paris Adult Theatre I v. Slaton**, 413 U.S. 49, 57 (1973) in authorizing States to **ban** obscenity, even as to "consenting adults":

> Although we have often pointedly recognized the high importance of the state interest in regulating the **exposure of obscene materials to juveniles** and unconsenting adults, (citations omitted),this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material.
>
> ....

> In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, **even assuming it is feasible to enforce effective safeguards against exposure to juveniles** and to passersby.[7] (emphasis added).

What is important is that regulation of juvenile access to, exposure to, or the availability of obscene material to them has been a forgone conclusion of the Court for more than 30 years. That sort of regulation was clearly seen as **less intrusive to or suppressive of First Amendment rights** than the efforts to ban or to eliminate the material itself that the Court was in the process of approving.

Given this Court's decision in **Ginsberg v. New York**, 390 U.S. 629 (1968), defining such obscene material as to juveniles and authorizing a ban of access by them to such material in the commercial context of sale, the City Council, after hearing from a Task

Force that was constituted to investigate the effects of "pornography" on the community in view of the debate surrounding the "civil rights approach to pornography", ("'pornography' as 'sex discrimination'"), determined that the harm of juvenile exposure could be effectively dealt with **only** if regulation of commercial exposure prior to sale, or in lieu of sale, were enacted to support the commercial sales restriction: "regulation of sales without control over commercial displays of materials deemed harmful to minors would render protective efforts meaningless." **American Booksellers Association, Inc., v. Rendell**, 481 A.2d 919, 942 (Pa. Super. 1984).

Minneapolis enacted its regulation, and the Ordinance was vigorously challenged immediately upon its effective date, but **before** any experience could be gained concerning its enforcement. The District

Court and the Eighth Circuit Court of Appeals were both told by the booksellers that the Ordinance was unduly burdensome and expensive to the booksellers, overbroad in its scope, invalid as "time, place, and manner" regulation, and suppressive of adult rights. In extensive, analytical, and well-reasoned opinions, both Courts rejected these speculative attacks upon the Constitutionality of the Ordinance, the District Court calling the attack based upon alleged infringement of adult access ala **Butler v. Michigan**, 352 U.S. 380 (1957) "clearly overstate[d] somewhat", **Upper Midwest Bookseller's v. City of Minneapolis**, 602 F.Supp. 1361, 1370 (D. Minn. 1985), and the Eighth Circuit Court of Appeals recognizing that the Ordinance fell into the interstices of current First Amendment doctrine, regulating the display of material protected as to adults and unprotected as to

minors. The whole issue became one of whether the Ordinance allowed sufficient adult access while prohibiting such access to minors. The Eighth Circuit concluded that display **restrictions** as to minors which **allowed display as to adults** and ultimate adult access were not unconstitutional, squarely rejecting the **Butler** attack in the same way this Court rejected a similar attack on sales restrictions in **Ginsberg**, supra, 390 U.S. at 634-635. **Upper Midwest Booksellers Association v. City of Minneapolis**, 780 F.2d. 1389 (8th Cir. 1985).

Despite the advance, conjectural claims of the seven-member Upper Midwest Booksellers Association as to the dire effects of the Ordinance upon merchants and customers, the experience of the City of Minneapolis in the nearly two years that the Ordinance has been in force (the District Court TRO was lifted February 25, 1985), has been precisely the

opposite. As the District Court predicted, and the Circuit Court confirmed, enactment and enforcement of the Ordinance did not usher in a era of repression of creativity or suppression of ideas.

There have been **no criminal prosecutions** under the Ordinance, as none have been necessary: compliance has been 100% and accomplished quickly and easily. Most merchants did not have to alter their marketing practices in any significant way, some not at all; and many reported improved relationships with and complimentary comments from their customers who had had concerns about minors' access to material short of "sale". The "sealed wrapper" concept has reportedly aided the marketing of materials by preventing such materials from becoming "shopworn" and has been voluntarily extended to materials **not** regulated by the Ordinance, those materials in "adults only" areas, and,

most interestingly, to materials in "adults only bookstores", with an "inspection copy" being made available for browsing, where the merchant desires it. The proprietor of a store that had an "adults only" area prior to the ordinance has noted that the "sealed wrapper" increases interest in the materials by allowing the purchaser to speculate that the contents contain something other than the expected, whereas allowing the prospective purchaser to satisfy his curiosity results in knowledge that there is "nothing new". In any case, the material has remained available for display, marketing, and purchase, impulse or otherwise. **No local merchant has reported or complained of loss of sales or profits due to the Ordinance.**

At first, there was a flurry of isolated, "protest overcompliance" with combination opaque-and-sealed wrappers, supplied by the wholesaler to the merchant

upon request, appearing on material that required neither "sealing" nor "blocking from view" of minors. That activity soon died out as the merchants accepted the fact that the Ordinance focused **only** upon that material which they **already could not "sell" to minors under the similar, existing state regulation.**

Compliance with the Ordinance is so familiar, because of the State's **Ginsberg-type** statute, so easily accomplished and unobtrusive, and such a practical way to achieve the commonly accepted goals of the Ordinance, that it has become a way for the merchants to demonstrate their sensitivity and concern over the issue of sexually explicit material to both parents and community. The practices **required** in Minneapolis (pop. 370,000) have spread throughout the greater metropolitan area (pop. 2,000,000+) on a **voluntary** basis by the merchants themselves, especially the "chain"

stores and video merchants. These merchants have apparently found economic **benefit** to themselves in these practices in order to engage in what the challengers of the Ordinance so hysterically and loudly condemned. The merchants are offering that "supervision of children's reading" (See **Ginsberg**, supra, 390 U.S. at 640) that parents and the community want, as members of the community, not adversaries to it. Even the Minneapolis Star and Tribune, a practitioner of the fullest extent, and staunch supporter and defender, of First Amendment freedoms, found the Ordinance logical, sensible, and effective. See Appendix.

It was, therefore, with great dismay that the City of Minneapolis, saw the Fourth Circuit Court of Appeals not only succumb to the hysterical speculations of the challengers of the Virginia statute when

concrete experience was available in Minneapolis, **City of Renton v. Playtime Theatres, Inc.**, ___ U.S. ____, 106 S.Ct. 925 (1986), but also attack the logical and legal foundation of the whole concept of "obscenity", display and other regulation of obscenity, and the validity of the Eighth Circuit Court decision and those decisions of this Court upon which it is based. If the Fourth Circuit's reasoning concerning regulation of display in general is adopted or upheld in this Court, then there will be no display regulation possible. The Fourth Circuit decision in this matter is grounded upon the premise that material, protected in any context, is protected absolutely in all contexts: it "throws the baby out with the bath water."

The City of Minneapolis, Minnesota, a political subdivision, submits this brief pursuant to Supreme Court Rule 36.1 and 36.4.

STATEMENT OF REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

Through its decision in this matter, the Fourth Circuit Court of Appeals has hopelessly confused the analysis of the area of "display regulation" law that is developing across the country, thwarted the reasoning and balance of doctrines enunciated by this Court, and engaged in sophistry. Whether consciously or not, the Fourth Circuit has questioned the very validity of this Court's fundamental rulings on "obscenity." This Court must address the area, clarify the analysis by eliminating the confusion, and provide the Constitutional guidance that the entire country needs and desires in this area, where so much activity is occurring.

The Fourth Circuit Court had two main enunciated concerns about the Virginia Amendment: first, that it was "content-

based"; second, that it was "overbroad". These articulated concerns were mixed and matched, and confused with other, unarticulated concerns.

I.

Regarding the restrictions as being "content-based", it should be noted that the display regulations are just as content-based as the sales regulation that preceded them in time, nationwide application, and approval of this Court. "Obscenity" itself is a content-based concept. Calling these display regulations Constitutionally invalid is tantamount to calling this Court's handling of "obscenity" in general, and "variable obscenity" in particular (See **Mishkin v. New York**, 383 U.S. 502 (1966) and **Ginsberg**, supra), invalid as content-based. The definitional approach created and fostered by this Court concerning obscenity **is** based upon a review of the content of a work. There is

no escaping that reality. But merely labelling a regulation as content-based misconceives the issue.

The issue is whether expression is either **protected** or **unprotected.** "Obscenity" is unprotected expression. **Miller v. California**, supra; **Paris Adult Theatre I v. Slaton**, supra; **Kois v. Wisconsin**, 408 U.S. 229 (1972); **Ginsberg v. New York**, supra. The reasoning for this lack of protection has been succinctly stated by this Court:

> The protection given speech and press was fashioned to assure unfettered interchange of **ideas** for the bringing about of political and social changes desired by the people. (Emphasis in original).

Miller, 413 U.S. at 35-36. Although all **ideas** having the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the First Amendment guaranties,

> ...there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. **These include the lewd and the obscene.... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality....**

Miller, supra, 413 U.S. at 20-21, citing **Roth v. United States**, 354 U.S. 476 (1957) (emphasis supplied by the **Roth** Court), citing **Chaplinsky v. New Hampshire**, 315 U.S. 568, 571-572. The key feature of "obscenity", then, is that it is not "speech"; it does not express "ideas"; it has no "content"; its regulation does not involve censorship of ideas -- good or bad, sound or unsound -- and repression of political liberty. See **Miller**, supra, 413 U.S. at 36-37. The distinction between protected and unprotected expression

is based on the content of the work taken as a whole and upon judgments being made concerning its "prurient appeal", "patently offensive manner", and "lack of serious value". These judgments cannot be made unless and until the content of a work is reviewed.

In order for a regulation to be suspect as content-based, that regulation must apply to "speech", to protected expression; and it must be aimed **directly** at that expression, **because** of its content: the analysis smacks of equal protection analysis and turns on "whether there is an appropriate governmental interest suitably furthered by the differential treatment." **Police Dept. of Chicago v. Mosely**, 408 U.S. 92, 95 (1972). See also **Heffron v. International Society for Krishna Consciousness, Inc.**, 425 U.S. 640 (1981); **Erznoznik v. City of Jacksonville**, 422 U.S. 205 (1975). Because the Virginia

statute is concerned with materials that are not "speech", are not protected as to minors, that **are obscene** as to minors, "content-based" analysis does not apply; as the rational basis for the differential treatment in furtherance of an appropriate governmental interest is present, by definition: the material "obscene"; it is material that is harmful to minors; the material is only partially protected. The Fourth Circuit Court did not address this aspect of the case before it, nor the importance of context (See **Kois**, supra) in determining the amount and nature of protection to which material may be entitled.

Because this same material is presumably protected as to adults, display regulation is arguably in the interstices of current First Amendment doctrine. This Court has allowed "time, place, and manner" regulation of protected speech, where there was a valid

governmental interest unrelated to the speech being narrowly and directly pursued, such that any impact upon protected speech was incidental, insubstantial, and no greater than that necessary to pursue the valid governmental purpose. **Young v. American Mini Theatres, Inc.**, 427 U.S. 50 (1976) ("adult" movies); **Lehman v. City of Shaker Heights**, 418 U.S. 298 (1974) ("political" versus "product" advertising on public busses); **Grayned v. City of Rockford**, 408 U.S. 104 (1972) (noise near schools); **Cox v. Louisiana**, 379 U.S. 559 (1965) (demonstrations in or near courthouse). **Young** and **Lehman** involved content-based distinctions. Mr. Justice Stevens, writing for the plurality in **Young**, supra, expressly contemplated the regulation of the manner of display of material harmful to minors, based upon content, and even though protected as to adults:

> More directly on point are opinions dealing with the question whether the First Amendment prohibits the State from wholly suppressing sexually oriented materials on the basis of their "obscene character." In **Ginsberg v. New York**, (citation omitted), the Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Indeed, the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults.[33] Surely the First Amendment does not foreclose such a prohibition; yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.

This Court's decision and analysis in **Ginsberg** is controlling in this case and in the whole area of regulation of material obscene as to children but protected as to adults. See **Upper Midwest Booksellers**, supra, 780 F.2d. at 1395. The Fourth Circuit

Court did not address the solution offered by **Ginsberg** and this Court, because that Circuit Court refused to grant to the State the interest and authority to address obscene material in a proper context, simply because the material may be protected in another context.

II.

The Fourth Circuit's second and major concern was the alleged "overbreadth" of the statute. The Court never really explained just in what way the Amendment was "overbroad." Its conclusion of law was the starting point for its "analysis," and it seems reasonably clear that the Court of Appeals was confused as to the doctrine it was purportedly applying.

In **Thornhill v. Alabama**, 310 U.S. 88, 97 (1940) this Court defined the concept of "overbreadth" with the following definition: "not aim[ing] specifically at evils within

the allowable area of state control but...sweep[ing] within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." By using the definition of obscenity as to minors approved by this Court in **Ginsberg**, the Commonwealth of Virginia should have been assured that its statute would not be definitionally overbroad, as it was focused upon material unprotected by the First Amendment in the context presented. The Fourth Circuit implicitly overruled this Court's decision in **Ginsberg** by calling the Commonwealth's statute overbroad, as it could be overbroad only if this Court's concept of variable obscenity is overbroad, simply because the concept impacts indirectly and incidentally upon material protected in other contexts. The only question that should have remained was whether this regulation achieved a **suppression** of material protected as to

adults as was the case in **Butler v. Michigan**, supra, by not staying focused upon and "reasonably restricted to the evil with which it is said to deal." **Butler v. Michigan**, supra, 352 U.S. at 383. The Fourth Circuit Court of Appeals simply did not address the correct question; it also did not directly address its challenge to this Court's rulings on "obscenity". It assumed that because the material under consideration was partially protected in a proper context, the protections (to paraphrase **Butler**) need not be reasonably restricted to those areas and contexts with which those protections are said to deal.

This Court has already addressed the kind of adult access that must be made available in the context of regulation of material harmful to minors and as against a **Butler** challenge:

> [The statute] does not bar ... stocking the magazines and selling them to persons 17 years of age or older, and therefore ... is not invalid under our decision in **Butler**....

Ginsberg, 390 U.S. at 634-635. (emphasis added). In the same way, the Virginia statute does not bar the stocking, merchandising, and selling of the materials. The statute leaves it to the choice of the individual merchant as to which of several methods to employ in complying with the statute (preventing juvenile perusal and examination) consistent with effective merchandising practice. The Minneapolis ordinance operates similarly, setting a standard ("sealed wrapper"; "blocked from view") and leaving the merchant to choose which of the many and varied methods of compliance best suit the functionality required by the ordinance. **Viewed as an entity**, the market for this sexually explicit material is essentially unrestrained. **Young**,

supra, 427 U.S. at 62. This is the ultimate access of **Ginsberg**.

Where no message is silenced, censored, or suppressed, where no person is limited in their ultimate ability to gain access to the material, and where the message or content can still reach its intended audience, although maybe not as conveniently as before in **every** individual instance, (see **Young**, supra, 427 U.S. at 79, note 3), then freedom of expression is not curtailed. All that is required is for reasonable alternative avenues of communication to exist. **City of Renton**, supra, ___ U.S. ___; 106 S.Ct. 925 (1986). Not only are the claims of economic catastrophe to booksellers arising out of the implementation of a regulation such as this irrelevant to the First Amendment issues that are possibly raised, but also they are untrue.

> The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them?

Young v. American Mini Theatres, Inc., supra, 427 U.S. at 78-79, concurrence of Justice Powell.

III.

Finally we reach the sophistry utilized by the Court of Appeals to reach the result that it did. In its decision, the Court of Appeals declared:

> In the instant case, the amendment's language is broad, and it does not provide any potential defenses or methods of compliance.[8]

It sounds as if the Court was receptive to the idea of display regulation, if specific

methods were specified, rather than a performance standard; but as soon as one refers to footnote 8, one realizes that he was mislead by the Court:

> [8]As we note, infra, we disagree with the rationale of some cases which hold that otherwise constitutionally offensive "display" provisions can be legitimized by specifying certain restrictive display methods as being acceptable under the statute.

That Court then goes on to criticize the carefully reasoned rulings in **M.S. NEWS v. Casado**, 721 F.2d 1281 (10th Cir. 1983) and in **Upper Midwest Booksellers Association v. City of Minneapolis**, 780 F.2d 1389 (8th Cir. 1985) as allowing either insufficient compliance methods with the regulations or for approving restrictions unduly burdensome on adult First Amendment rights.

Can this be? First the Court recognizes the legitimate interest of the State in regulating juvenile access to obscene

material. Then it criticizes the effort for doing something about it in a minimally intrusive manner as to adult access, because the Statute doesn't **specify methods of compliance with which the Court can disagree, if it had.** Was that Court really concerned about some concept of lack of fair notice, instead of overbreadth? To paraphrase that Court's reasoning: the statute is invalid because of the failure of the legislature to require overly burdensome methods of compliance; and if the legislature had supplied those methods of compliance approved in other jurisdictions, the statute would also be invalid. Apparently there is no way that the Fourth Circuit will allow regulation of the manner of display of obscene material. That Court offers no illumination as to what kind, or within what parameters, if any, specified methods of compliance would be approved. That Court also offers no

explanation or reasoning as to how this Court's approved definition of material harmful to minors and accommodation of adult access (see **Ginsberg**, supra.) overreaches its intended object so as to **suppress** adult access to the material.

CONCLUSION

Communities across the country have enacted statutes and ordinances like the one before this Court for the purpose of protecting minors from the effects of material harmful to minors. In order to avoid suppression of ideas and creativity and out of respect for the right of adult access to this material, these legislative enactments have carefully and narrowly focused on obscene material, allowed it to continue to be displayed to the public and sold to those persons as to whom it constitutes protected material, and required only that minors not be given that sort of

access to the material that would be harmful to them. Out of respect for the many and varied contexts in which material is marketed in our society and out of respect for the intelligence and creative abilities of the merchants, these enactments have not limited the ability of the merchants to constructively market their wares to adults while at the same time addressing the harms of obscenity as to children.

The Fourth Circuit Court of Appeals has taken away the ability of a community even to try to address their concerns in this area by misconstruing the Virginia Statute, misconstruing and misapplying the constitutional doctrines and decisions of this Court, and by imposing diametrically opposing, mutually exclusive, requirements on any approach to this legitimate concern. There are other Courts of Appeals which have addressed the concerns raised in this case

and reached results contrary to that of the Fourth Circuit by following earlier decisions of this Court. Because of the conflict presented and the confusion engendered by the constitutional dimension of the conflict, lawmakers across the country look to this Court for the clarity and guidance in this area that only this Court can provide at a time when it is necessary to do so.

Respectfully submitted,

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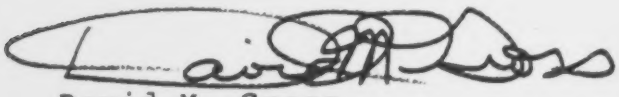
City of Minneapolis



David M. Gross
Assistant City Attorney

January 23, 1987

APPENDIX

Minneapolis Star and Tribune

Established 1867

Roger Parkinson Publisher and President
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Tim J. McGuire Managing Editor
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10A

Monday, January 6, 1986

A constitutional way to control porn

Minneapolis residents may differ about whether adults should be free to buy pornography, but most concur that children shouldn't be exposed to it. That is the logic behind the city's opaque-cover ordinance, which shields youngsters from sexually explicit magazines without hindering adults from buying them. Upheld last week by the 8th U.S. Circuit Court of Appeals, the ordinance draws a sensible line between the First Amendment rights of adults and the sensitivity of children.

Passed by the Minneapolis City Council in the summer of 1984, the anti-porn ordinance requires sexually explicit material that could be seen by minors to be displayed for sale in sealed wrappers and under opaque covers. The new requirement looked like a practical way to control pornography's negative effects. But to some magazine sellers, it looked like censorship. The sellers sued, claiming that the city had overstepped its authority to regulate explicit material and had unconstitutionally limited adults' access to such magazines.

Courts are correctly attentive to claims of censorship. Upon close examination, many seemingly innocuous regulations turn out to be schemes for censoring unpopular publications. But District Judge Harry MacLaughlin, who heard the magazine sellers' case last year, could find no such purpose in the opaque-cover ordinance. Neither could the appeals court, which affirmed MacLaughlin's ruling by a 2-1 vote. Writing for the majority, Circuit Judge Pasco Bowman declared that the ordinance is a permissible strategy for protecting minors from obscene materials. Any restriction on adults, Bowman concluded, "is merely an incidental effect of the permissible regulation and is minimal in its impact."

That assessment didn't sway Chief Judge Donald Lay, the appellate panel's lone dissenter. "If the First Amendment means anything," Lay wrote, "it should be clear that the Minneapolis ordinance is unconstitutional on its face." Lay places admirable emphasis on the rights of magazine sellers and readers. But as Bowman's opinion noted, the ordinance does little to curtail those rights. Adults are still free to request a review copy from a merchant or to visit bookstores where magazines remain unsealed in adults-only sections. And adults can still obtain full access to such magazines in the old-fashioned way: by purchasing them.

Pornography's offensiveness is no reason to suppress it, as Lay's thoughtful dissent suggests. But the opaque-cover ordinance isn't censorship. It protects children from tasteless magazines without substantially limiting the access of adults. It thus achieves two desirable ends: controlling pornography's troubling side-effects while leaving adults free to sell, buy and read whatever they like.